85-861

Supreme Court, U.S.
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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

HADDON HOUSE FOOD PRODUCTS, INC.
AND FLAVOR DELIGHT, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, et al,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit has created a conflict with the decisions of other circuit courts of appeal by determining that it is an *ipso facto* violation of the National Labor Relations Act for an employer to extend voluntary recognition to a union supported by an uncoerced majority of employees during the pendency of a representation petition filed by a rival union.*

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*In addition to Haddon House Food Products, Inc. and Flavor Delight, Inc., and the National Labor Relations Board, both Local Union No. 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 80, Food and Allied Service Workers, chartered by United Food and Commercial Workers, AFL-CIO, were parties to the proceedings below.

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HADDON HOUSE FOOD PRODUCTS, INC. AND FLAVOR DELIGHT, INC.,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Haddon House Food Products, Inc. and Flavor Delight, Inc., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on June 12, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 764 F.2d 182, and is reproduced *infra* in Appendix A-3 through A-15.[1]

1. References to portions of the record, which are reproduced in the Appendix, are designated by their appropriate page numbers.

The decision and order of the National Labor Relations Board, dated March 23, 1984, is reported at 269 NLRB No. 60, and is reproduced *infra* in Appendix A-16 through A-41.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1985. The Court of Appeals denied the petition of Haddon House Food Products, Inc. and Flavor Delight, Inc. for rehearing *in banc* on August 22, 1985. This Court has jurisdiction under 28 U.S.C. §1254(1).

APPLICABLE STATUTORY PROVISIONS

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, (hereinafter referred to as the "Act"), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of this title.

Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 8(a)(2) of the Act, 29 U.S.C. §158(a)(2), provides in pertinent part:

> It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

Section 8(a)(3) of the Act, 29 U.S.C. §158(a)(3), provides in pertinent part:

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 9(a) of the Act, 29 U.S.C. §159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

STATEMENT OF THE CASE

Petitioner, Haddon House Food Products, Inc. (hereinafter the "Employer"), is a New Jersey corporation engaged in the wholesale distribution of food products. Ancillary aspects of the Employer's business include the warehousing and delivery of its products to food stores, department stores, delicatessens and various other distributors of its products. Petitioner, Flavor Delight, Inc., (hereinafter also referred to as the "Employer"), is a New Jersey corporation engaged in the manufacture and packaging of a line of seasonings and spices which are marketed by Haddon House Food Products, Inc. Haddon House Food Products, Inc. and Flavor

Delight, Inc. occupy adjoining premises in Medford, New Jersey.

On November 13, 1975, Local Union No. 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 115"), attempted to organize employees at the Employer's Medford, New Jersey facilities. On November 19, 1975, Local 115 filed a representation petition with the National Labor Relations Board (hereinafter "NLRB"), requesting that an election be held. Certain actions of the Employer in response to Local 115's organizational efforts became the subject of unfair labor practice charges filed by Local 115 with the NLRB. The filing of these charges resulted in a delay in the processing of the election petition. Local 115 did not request further processing of the representation case but chose to attempt to obtain representative status through the pending unfair labor practice litigation by seeking a bargaining order remedy.

The Employer substantially remedied the unfair labor practices in 1975 and 1976 by offering reinstatement to nineteen former employees, twelve of whom returned to work. However, due to various delays attendant to litigation, the case dragged on for more than six years. By 1981, long after Local 115's active organizational efforts ceased, Local 80, Food and Allied Service Workers, chartered by United Food and Commercial Workers, AFL-CIO (hereinafter "Local 80"), organized employees at the Employer's facility. The American Arbitration Association conducted an independent verification of union authorization cards, and certified Local 80's majority status. Accordingly, the Employer, pursuant to Section 9(a) of the Act, voluntarily recognized Local 80 on July 8, 1981, as its employees' exclusive bargaining representative. On July 24, 1981, the Employer and Local 80 executed a collective bargaining agreement extending over

a three year term. The collective bargaining agreement, which provides for labor stability, is a realization of the purposes of the Act.

Following the filing of unfair labor practice charges by Local 115 challenging the Employer's recognition of Local 80, the NLRB found that the Employer had violated Sections 8(a)(1), (2), and (3) of the Act by granting recognition to and entering into a contract with Local 80 and by giving effect to a union security provision contained in the agreement.

The Employer petitioned for review of the NLRB's Order to the United States Court of Appeals for the Third Circuit and the NLRB filed a cross-application for enforcement both against the Employer and against Local 80. The Court of Appeals enforced the NLRB's Order, determining that a real question concerning recognition existed at the time the Employer extended recognition because, *ipso facto*, a petition for representation filed by Local 115 was pending. The Court also enforced the NLRB's finding that the Employer did not represent an uncoerced majority of employees. Following the Employer's petition for rehearing *in banc*, the Third Circuit, on August 22, 1985, declined to rehear the case.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals for the Third Circuit Conflicts with the Decisions of the Second, Fourth, Sixth, Seventh, and Eighth Circuit Courts of Appeal on an Important Question of Federal Labor Policy.

It is a well-established precept that:

> . . . one of the principal objectives of the National Labor Relations Act is to promote peace and tranquility between labor and management, while insuring employees the opportunity to be represented by the union of their choice.

NLRB v. Peter Paul, Inc., 467 F.2d 700, at 702 (9th Cir. 1972). This tenuous yet essential balance of interests is most effectively promoted through the Act's carefully structured mechanism for permitting an employer to extend voluntary recognition to a union demonstrating the support of an uncoerced majority of employees. By its decision, the Court of Appeals has dismantled this mechanism and upset the balance, and in so doing, has thwarted the purposes and policies of the Act. At a time where mounting frustration with administrative and judicial resolution of conflicts in the labor relations arena has driven the nation's labor unions towards increased militancy and reliance upon self-help, the deleterious effect this decision will have on the preservation of the Act's ability to promote labor peace and industrial stability is staggering.

In the instant decision, the Court of Appeals has effectively overturned 25 years of established Third Circuit precedent[2] as well as created a significant conflict with the approach summarily applied by several other circuit courts of appeal and tacitly approved by this Court. Based on mere technical violations of the Act, the Court of Appeals held that an employer's freedom to extend voluntary recognition to a majority status union ceases at the precise point a representation petition is filed and suspends the possibility of recognition indefinitely, until such time as the issue raised by the outstanding petition is resolved. In the past, the Third Circuit as well as the other circuit courts of appeal have steadfastly held to the contrary, expressing a well-founded position that such a "bright line" approach directly contravenes a perfectly suitable means for resolving labor relations disputes within the meaning of the Act. Following this decision,

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2. The Third Circuit's decision in the instant matter is contrary to its previous holdings in *NLRB v. Swift & Co.*, 294 F.2d 285 (3rd Cir. 1961); *NLRB v. Air Master Corp.*, 339 F.2d 553 (3rd Cir. 1964); and *Suburban Transit Corp. v. NLRB*, 499 F.2d 78 (3rd Cir.), *cert. denied*, 419 U.S. 1089 (1974).

resolution in the manner prescribed by the various circuits is deemed no longer appropriate by the Third Circuit, thus upsetting well-established precedent, as well as the purposes and policies of the Act.

The Court of Appeals' decision was premised upon adoption of the NLRB decision styled *Bruckner Nursing Home*, 262 NLRB 955 (1982), which represents a qualification of the doctrine the NLRB established in *Midwest Piping & Supply Co, Inc.*, 63 NLRB 1060 (1945). In *Midwest Piping, supra*, the NLRB held that an employer violates the Act by extending recognition to one rival union, notwithstanding a demonstration of majority status by authorization cards, at a time when the employer knew of the existence of a *real* question concerning representation. In *Bruckner Nursing Home, supra*, the NLRB qualified the *Midwest Piping* doctrine by determining that an employer is free to recognize one of two rival unions in an initial organizing context upon evidence that the union represents an uncoerced majority of employees, until such time as a representation petition is filed with the NLRB. The Court of Appeals, by adopting *Bruckner Nursing Home, supra*, is effectively holding that the filing of a representation petition, in and of itself, raises a real question concerning representation which precludes an employer from recognizing a rival union demonstrating uncoerced majority status, despite the fact that the Third Circuit, along with several other circuits, have repeatedly rejected this precise concept. The established law of the Third Circuit (prior to the instant decision) and that of various other circuits have sanctioned an employer's voluntary recognition of a union supported by an uncoerced majority of employees, notwithstanding the pendency of a representation petition filed by a rival union.

In the instant case, the initial demand for recognition and the subsequent filing of a representation petition by Local 115 occurred six years prior to the Employer's recognition of Local 80. No further demand

for recognition was made by Local 115 following its original petition. In the interim, all active organizational efforts of Local 115 ceased, and the employees manifested a clear desire to be represented by Local 80. The American Arbitration Association conducted a verification of union authorization cards, and certified Local 80's majority status. To find that the representation petition filed in 1975 rendered the Employer's voluntary recognition of Local 80 in 1981 violative of the Act, effectively precludes implementation of the employees' true desires, creating a conflict regarding the clear precedent established by the various circuits as well as frustrating the purposes of the Act and undermining national labor policy.

Although the instant matter represents the first direct judicial scrutiny of the *Bruckner Nursing Home*, *supra*, qualification of the *Midwest Piping* doctrine, all other circuits addressing the issue have consistently and summarily rejected the principle espoused in *Bruckner Nursing Home*. In *NLRB v. Newport Div. of Wintex Knitting Mills*, 610 F.2d 430 (6th Cir. 1979), a fact pattern analogous to that of the instant matter was presented. There, an employer faced the organizing efforts of two rival unions. Following the filing of a representation petition by one such union, both unions filed unfair labor practice charges against the employer. The NLRB postponed the election until such time as the outstanding unfair labor practices were resolved. During the interim, one of the two rival unions continued its intensive organizing drive, enlisting new employees as they were hired, whereas the other union's efforts ceased soon after filing its petition. The employer then extended recognition to the active union upon demonstration of majority status. The NLRB determined that a real question concerning representation existed at the time the employer extended voluntary recognition and it thus committed an unfair labor practice by recognizing one union when a

rival's petition was outstanding. The Sixth Circuit refused to enforce the NLRB's Order and determined that when one of two rival unions has convincingly demonstrated majority status without help from the employer, it is not an unfair labor practice to extend recognition to the uncoerced majority status union.

The court in *Newport, supra*, relied upon consistent Sixth Circuit policy, as summarized in *NLRB v. Standard Steel Spring Co.*, 180 F.2d 942, at 946 (6th Cir. 1950):

> The mere circumstance that there is pending an undisposed proceeding before the Board for the determination of the employee's choice of representative, based on a petition brought by one union, does not convict an employer of unfair labor practices for recognizing another union as the employee's representative on clear proof of such majority representation, submitted several months after the inception of the representation proceedings.

On yet another occasion, the Sixth Circuit expressed its clear rejection of the principle established in *Bruckner Nursing Home*:

> . . . The filing of the petition and a hearing thereon does not in and of itself constitute a reasonable basis for the employer to believe that a real question concerning representation exists.

NLRB v. North Electric Company, 296 F.2d 137, at 140 (6th Cir. 1961).

The Eighth Circuit has determined that while the pendency of one union's representation petition may stand as a prime factor in determining whether an employer violates the Act in extending voluntary recognition to a rival union, it is not *ipso facto* determinative of whether a real question concerning representation existed at the time voluntary recognition was extended.

Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir. 1964).

> . . . The mere filing by one union of a certification petition with the Board does not ipso facto — under all circumstances preclude an employer from recognizing a rival union as the employees' bargaining representative.

Id., at 182.

The Eighth Circuit cited this Court's recognition that an employer can take reasonable steps, *i.e.*, an independently conducted investigation of authorization cards, to readily ascertain the validity of one union's majority status and thus obviate the necessity for an NLRB conducted election. *See, International Ladies' Garment Workers, etc. v. NLRB*, 366 U.S. 731 at 739-40 (1961).

The list of circuits rejecting the doctrine embraced by the Third Circuit in the instant matter is extensive. The Seventh Circuit has recognized that in extending recognition to a union demonstrating support of an uncoerced majority of employees, the employer is merely obeying and effectuating the purposes and policies of the Act; promoting labor peace by preserving the employees' exercise of free choice in choosing an exclusive bargaining representative. *Playskool, Inc. v. NLRB*, 477 F.2d 66 (7th Cir. 1973). The Seventh Circuit has taken a very pragmatic approach to the effect an outstanding petition has, *vis a vis* the creation of a real question concerning representation, expressing its adamant position that employees' unfettered choice, when clearly expressed, takes precedent over the mere filing of a representation petition:

> The Act does not require, however, that this neutrality continue until the last dissident voice is stilled. Indeed, in keeping with the purpose of the Act, harmonious employer — employee relations require that the instability inherent in a contest end

> when one contestant is able to muster majority support. Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees.

National Labor Relations Board v. Indianapolis Newspapers, 210 F.2d 501, at 503-4 (7th Cir. 1954). Moreover, and illustrating the firmness of its position, the Seventh Circuit has clearly and concisely stated: "the fact that [the Union] petitioned for representation does not in and of itself raise a real question of representation". *St. Louis Independent Packing Company v. NLRB*, 291 F.2d 700 at 704 (7th Cir. 1961).

Similar language is contained in decisions of various other circuit courts of appeals, including the Fourth Circuit. *See, District 50 United Mine Workers v. NLRB*, 234 F.2d 565 (4th Cir. 1956). The Second Circuit, in *Abrams v. Carrier Corp.*, 434 F.2d 1234 at 1243 (2nd Cir. 1970), determined that ". . . the mere filing of a petition does not, in itself, warrant a finding or conclusion that a real question concerning representation exists". In *American Can Co. v. NLRB*, 535 F.2d 180 (2nd Cir. 1976), the Second Circuit utilized an "all of the circumstances" test for determining whether a real question concerning representation exists, recognizing that no single factor such as the filing of a representation petition can be viewed as unconditionally determinative.

The instant case represents the first judicial scrutiny of the NLRB's *Bruckner Nursing Home, supra*, decision. However, as has been demonstrated, the precise concept crystallized by the NLRB in that decision has been rejected time and again by the various circuits. Holding that once a petition for representation is filed, it is an unfair labor practice for an employer to recognize a rival union despite demonstration of support by an uncoerced

majority of unit employees, is contrary to the well-established law of the various circuits. When such a "bright line" standard is applied in circumstances such as those presented by the instant matter, allowing a six year old petition filed by a long-since inactive union, to block recognition of a majority status rival union, frustrates the purposes and policies of the Act which is designed to effectuate employees' choice of representative for the purpose of collective bargaining. Overlooking issues such as employee turnover and evolving sentiment, apparent in the instant matter, which can render an outstanding petition stale, ignores the reality of the situation and frustrates employees' true desires.

Moreover, this matter is one which raises important issues of federal labor law as the conflict created by the Third Circuit stands in direct contravention of the purposes and policies of the Act which is designed to promote industrial stability and labor peace through facilitating employees' selection of bargaining representative. A case of first impression, such as this one, which creates precedent and conflicts with the various circuits, precluding an employer's recognition of the will of a majority of its employees; instead mandating blind compliance with NLRB procedure, in contravention of the purposes and policies of the Act, creates serious and far-reaching consequences. Consideration is required by this Court in order to determine the novel and important question of whether the Third Circuit was correct in enforcing the NLRB's Order establishing that the filing of a representation petition, in and of itself, creates a real question concerning representation, precluding an employer from extending voluntary recognition to a rival union demonstrating uncoerced majority status.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3445 and 84-3537

HADDON HOUSE FOOD PRODUCTS, INC.
and FLAVOR DELIGHT, INC.,
Petitioners in No. 84-3445

v.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 84-3537

and

TEAMSTERS LOCAL UNION NO. 115 a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN and
HELPERS OF AMERICA,
Intervenor

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, LOCAL 80,
Intervenor

(NLRB No. 4-CA-12404)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and NEWCOMER, *District Judge*[*]

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[*] Hon. Clarence C. Newcomer, United States District Judge for the Eastern District of Pennsylvania, on panel rehearing only.

The petition for rehearing filed by Haddon House Food Products Inc. and Flavor Delight, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Judge

Dated: August 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3445 & 84-3537

HADDON HOUSE FOOD PRODUCTS, INC.
and FLAVOR DELIGHT, INC.,
Petitioners in No. 84-3445

v.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 84-3537

and

TEAMSTERS LOCAL UNION NO. 115 a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN and
HELPERS OF AMERICA,
Intervenor

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, LOCAL 80,
Intervenor

(NLRB No. 4-CA-12404)

ON PETITION FOR REVIEW
AND CROSS APPLICATION
FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

Argued: April 30, 1985
Before: GIBBONS and HIGGINBOTHAM,
Circuit Judges and
NEWCOMER, *District Judge**

(Opinion Filed: June 12, 1985)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Haddon House Food Products, Inc. and Flavor Delight, Inc. (the employers) petition pursuant to section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (1982), to review an unfair labor practice order issued by the National Labor Relations Board, reported at 269 NLRB No. 338 (1984). The Board has filed a cross-application for enforcement both against

the employers and against Local 80, Food and Allied Service Workers, chartered by United Food and Commercial Workers, AFL-CIO (Local 80). Local 80 has intervened, as has the charging party before the Board, Local Union No. 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 115). We enforce the Board's order.

I.

The 1975 Proceedings

The employers are engaged in the manufacture, sale and distribution of food products at premises in Medford, New Jersey. They have common management and unified labor relations policies, and comprise a single employer for purposes of the National Labor Relations Act. In November of 1975, Local 115 obtained a substantial number, although not a majority, of union authorization cards from employees in the Medford bargaining unit. On November 19, 1975, Local 115 filed a petition for a representation election. On November 21, 1975, Local 115 filed unfair labor practice charges against the employers. The election petition was held in abeyance by the Board pending resolution of the unfair labor practice charges.

On June 12, 1979, the Board resolved the unfair labor practice charges against the employers. The Board found that the employers had responded to Local 115's organizational campaign by engaging in numerous violations of section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3) (1982). These violations included discharging eight employees for engaging in union activities, the refusal to reinstate fourteen unfair labor practice strikers, and widespread threats of discharge for engaging in protected activities. The Board ordered the employers to cease and desist from engaging in the unfair labor practices it found, and from in any other manner interfering with,

restraining, or coercing their employees in the exercise of their statutory rights. It ordered the employer to offer reinstatement with back pay to the eight discharged employees and the fourteen unreinstated strikers.

The Board also ordered the usual notice posting, and directed the employers to grant Local 115 and its representatives access to employer bulletin boards, and to nonwork areas in the plant during employees' nonwork time. It ordered the employers to permit Local 115's representatives the opportunity to deliver a thirty minute speech to employees during working hours at least forty-eight hours but not less than ten working days before any Board representation election in which Local 115 participated. These access remedies were ordered to dissipate the atmosphere of fear created by the employers' unlawful conduct, and in lieu of a bargaining order. A bargaining order was not ordered because Local 115, while obtaining a sufficient number of authorization card signatures for a representation election, had not obtained a card majority. The Board's order, reported at 242 NLRB 1057 (1979), was substantially enforced by the Court of Appeals for the District of Columbia Circuit. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 424 U.S. 837 (1981). That court rejected both Local 115's contention that a bargaining order should have been entered, and the employers' contention that access remedies were inappropriate. The judgment enforcing the Board's order was issued on November 4, 1981. The order had not, in the meantime, been fully complied with.

II.

The 1981 Proceedings

Following the decision of the Court of Appeals enforcing the Board's order, but while a petition for

certiorari seeking Supreme Court review of that decision was pending, Local 80, about June 15, 1981, commenced an organizing campaign by leafletting employees at the Medford plant. On June 29, Local 80 demanded recognition. The American Arbitration Association conducted a union authorization card check and certified to the employers that a majority of employees in the bargaining unit had signed Local 80 cards. Local 115 was not notified of the card check, and the American Arbitration Association was not notified of Local 115's pending representation election petition, or of the prior unfair labor practices. On July 8, the employers recognized Local 80, and on July 24, entered into separate collective bargaining agreements, one covering production employees, and one covering warehouse employees. Both Local 80 contracts contain union-security clauses requiring all covered employees to become members of that local.

By the time the employers recognized Local 80 and entered into collective bargaining agreements with it, they had offered reinstatement to all of the eight dischargees, and to eleven of the fourteen unfair labor practice strikers. They had not complied, however, with any of the Board's remedial notice and access requirements. Indeed they did so thereafter only when the Board instituted contempt proceedings.

The Board found that the employers violated sections 8(a)(2) and (1) of the Act, 29 U.S.C. § 158(a)(2) and (1) (1982), when they entered into collective bargaining agreements with Local 80 at a time when it did not represent an uncoerced majority in the bargaining units, while Local 115's representation petition was pending, and while the 1975 unfair labor practices remained unremedied. The Board also found that Local 80 violated section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by accepting such recognition. Moreover, the Board found that employers violated

section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), and that Local 80 violated section 8(b)(2) of the Act, 29 U.S.C. § 158(b)(2), by entering into collective bargaining agreements containing union-security clauses at a time when Local 80 was not entitled to recognition.

To remedy these violations the Board ordered the employers and Local 80 to cease and desist from the unfair labor practices found, and to refrain from interfering with, restraining, or coercing employees in any way in the exercise of their statutory rights. The Board also ordered that the employers withdraw recognition from Local 80 unless it is certified by the Board after an election, and ordered the employers and Local 80 to reimburse employees for all initiation fees, dues, assessments or other payments made pursuant to the unlawful union-security clause. Finally, the Board reaffirmed most of the access remedies ordered for the benefit of Local 115 in the 1975 proceedings since the record did not show that there had been compliance.

III.

Recognition of Local 80 Violated the Act

The Board's holding that the employers violated the Act by recognizing Local 80 rests on two alternative grounds: that a real question concerning recognition existed at the time of such recognition; and that Local 80 did not represent an uncoerced majority. Both grounds, either of which would justify the order to withdraw recognition, are challenged by the employers and Local 80. We address them separately.

A. The Real Question Concerning Representation

In *Midwest Piping and Supply Company*, 63 NLRB 1060 (1945), the Board held that an employer

rendered unlawful assistance when it entered into a collective bargaining agreement with one of two rival unions at a time when a genuine question existed as to which union represented a majority of its employees. That basic principle is not in dispute. What the employers and Local 80 do dispute, however, is the Board's application of the *Midwest Piping* rule to this case. They rely on a series of cases in this court in which we refused to enforce Board orders requiring withdrawal of recognition of unions holding card majorities. *Suburban Transit Corporation v. NLRB*, 499 F.2d 78 (3d Cir. 1974); *NLRB v. Air Master Corporation*, 339 F.2d 553 (3d Cir. 1964); *NLRB v. Swift and Company*, 294 F.2d 285 (3d Cir. 1961). These cases can be fairly read as disapproving a tendency in the Board to read *Midwest Piping* so broadly as to prohibit a neutral employer from ever recognizing one of two rival unions absent a Board certification. They do not cast doubt, however, on the soundness of the basic rule. "To recognize one of two competing unions while the employees' choice between them is demonstrably in doubt, is an unfair labor practice under what the courts have accepted as the normal and proper application of the *Midwest Piping* doctrine." *NLRB v. Air Master Corp.*, 339 F.2d at 557. We simply have refused to find a genuine question concerning representation when one union is an incumbent, even though the rival has filed a representation petition, or has unequivocally demonstrated that it has the support of an uncoerced majority.

In an effort to clarify the circumstances in which neutral employers should refrain from recognizing one of two rival unions, the Board, in 1982, reconsidered the *Midwest Piping* doctrine. In *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982), the Board held that "the mere filing of a representation petition by an outside, challenging union will no longer require or permit an

employer to withdraw from bargaining or executing a contract with an incumbent union." The Board explained that if there was an existing collective bargaining relationship, an employer could not maintain the neutral posture required by the *Midwest Piping* rule since a refusal to bargain with an incumbent union might be perceived as favoring the challenger. Thus, employer neutrality was best approximated by maintaining the status quo pending certification of a challenger union. On the same day the Board considered a case in which two unions were seeking initial recognition. In *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982), the Board, taking note of the expressed preference of this court and others for a rule which permits employers to contract with a union holding cards from an uncoerced majority, held that it would no longer find a section 8(a)(2) violation, when two unrecognized unions are competing and when the employer recognizes the union that represents an uncoerced, unassisted majority. At the same time, however, the Board reaffirmed its position that "once notified of a valid petition, an employer must refrain from recognizing any of the rival [non-incumbent] unions." 262 NLRB at 957.

The Board's decision and order in this case is an application of the *Bruckner* qualification of the *Midwest Piping* doctrine. The effect of the *Bruckner* rule is that when faced with two rival non-incumbent unions, an employer is free to recognize that union authorized by an uncoerced majority at any time until the filing of a valid representation petition. A valid representation petition is defined as one which would entitle the petitioning union to an election. An election will not be held unless the petitioner has at least 30 per cent support. NLRB Statement of Procedure, Sec. 101.18(a), 29 CFR 101.18(a). *See NLRB v. J. I. Case Co.*,

201 F.2d 597, 598-99 (9th Cir. 1953). Thus, the Board's present position is that an employer may always bargain with an incumbent union until a new union is certified, and that if there is no incumbent an employer may recognize a union holding cards from an uncoerced majority until a representation petition is filed by a rival union authorized by at least 30 percent of the unit employees.

The employers and Local 80 contend that the *Bruckner* rule is inconsistent with *Hedstrom Company v. NLRB*, 558 F.2d 1137 (3d Cir. 1977), in that it amounts to an application of the "continuing demand" concept, under which an employer might be guilty of an unfair labor practice by failing to recognize a union that obtains majority status some time after an initial demand for recognition. *Hedstrom* is not in point. The Board did not oblige the employers to recognize either local union, and did not find an unfair labor practice in the employers' failure to bargain with Local 115. There is no "continuing demand" issue in this case.

The employees and Local 80 also contend that the *Bruckner* qualification of the *Midwest Piping* doctrine is in effect a non-acquiscence by the Board in our holding in *Suburban Transit, Air Master* and *Swift*. *See Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979). We disagree. The Board makes clear in *Bruckner* that it has in good faith accommodated its rule on determining questions concerning representation to the concerns this court expressed in those cases. The *Bruckner* rule is a satisfactory accommodation of the sometimes conflicting policies of prompt recognition of majority collective bargaining representatives and of uncoerced free choice in the selection of such representatives. Authorization cards are not a totally reliable indication of employee free choice, for when competing unions solicit, many

employees may sign cards for both. When the rival union has cards for 30 percent, there is a real possibility of such duplication. Drawing the line at the point at which one of two unrecognized rivals files a representation petition on behalf of 30 percent of the employees in the bargaining unit has the additional advantage of providing clear guidance to employers. Thus, we hold that the Board did not err when it applied the *Bruckner* test in this case. Local 115 had on file a valid representation petition known to the employers when they recognized Local 80. Thus, the employers violated section 8(a)(2). Local 80 violated 8(b)(1)(A) by accepting such recognition even if, as it asserted before the Board, it was unaware of Local 115's pending representation petition. *See International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-39 (1961). Moreover a collective bargaining agreement with an unlawfully recognized union containing a union-security clause violates sections 8(a)(3) and 8(b)(2). *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 138, 142 (3d Cir. 1976).

B. The Uncoerced Majority

Our approval of the Board's application, in this case, of the *Bruckner* rule is dispositive of the petitions for review insofar as they challenge the order to withdraw recognition from Local 80. The Board also relied alternatively upon the ongoing effects of the unfair labor practices still unremedied which it found in the 1975 proceedings. The employers and Local 80 challenge this reliance principally because of the passage of time. Throughout most of that time, however, the employers and Local 115 were engaged in protracted litigation. The Board's finding that the effects of the 1975 unfair labor practices made unfettered employee free choice unlikely while those practices remained unremedied is supported by

substantial evidence in the record as a whole. The Board did not err in holding that recognition of a union which lacks uncoerced majority support violates section 8(a)(2) of the Act. *Paul M. O'Neill International Detective Agency, Inc. v. NLRB*, 280 F.2d 936, 938 n.2, 939-46 (3d Cir. 1960).

IV.

The Board's Remedy is Not an Abuse of Discretion

The employers contend that the Board abused its discretion in providing, in the 1981 proceedings, access remedies substantially similar to those provided in the 1975 proceedings. Local 80 contends that the Board abused its discretion in ordering reimbursement of dues. Neither contention has merit.

The employers' unlawful recognition of Local 80 effectively nullified the access provisions of the prior proceeding. By the time access was permitted for Local 115, Local 80 had already recognized and entered into collective bargaining agreements with its rival. The unlawful recognition compounded the effects of the prior unfair labor practices, which were egregious and pervasive. We find no abuse of discretion in the order providing access remedies to Local 115 so that the effects of those unfair labor practices might be nullified.

As to the dues reimbursement remedy, we are taught by the Supreme Court that such an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Company v. NLRB*, 319 U.S. 533, 540 (1942). No such showing can be made here. Indeed the reimbursement of dues remedy appears particularly appropriate for restoration of a climate of neutrality in which a free choice may be

made among the unions competing for representation, or even for no union.

V.

Conclusion

The Board's application of its *Bruckner* qualification to *Midwest Piping* is consistent with the policies of the Act. The remedies imposed are not an abuse of discretion. The Board's order will, therefore, be enforced in full and the petitions for review will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HADDON HOUSE FOOD PRODUCTS, INC.
AND FLAVOR DELIGHT, INC.

and Case 4-CA-12404

TEAMSTERS LOCAL UNION NO. 115,
a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

LOCAL 80, FOOD AND ALLIED SERVICE
WORKERS CHARTERED BY UNITED FOOD
AND COMMERCIAL WORKERS, AFL-CIO

and Case 4-CB-4369

TEAMSTERS LOCAL UNION NO. 115,
a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge, as amended, duly filed by Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Charging Party Local 115, in Case 4-CA-12404, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 4, issued a complaint and notice of hearing, dated 16 December 1981 against Haddon House Food Products, Inc. and Flavor Delight, Inc., hereinafter referred to as Respondent Employer. Thereafter, upon a charge duly filed by Charging Party Local

115 in Case 4-CB-4369, the General Counsel, by the Regional Director for Region 4, issued an order consolidating cases and consolidated complaint and notice of hearing, dated 5 February 1982, against Respondent Employer and Local 80, Food and Allied Service Workers chartered by United Food and Commercial Workers, AFL-CIO, hereinafter referred to as Respondent Local 80. The consolidated complaint alleges that Respondent Employer has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1), (2), and (3) and 2(6) and (7) of the National Labor Relations Act, as amended, and that Respondent Local 80 has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(b)(1)(A) and (2) and 2(6) and (7) of the Act. Copies of the charges, the complaint, and order consolidating cases and consolidated complaint and notice of hearing were duly served on the parties. Respondent Employer and Respondent Local 80 filed answers to the consolidated complaint, denying that they committed any unfair labor practices.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an order. The parties stipulated that the charges, the complaint, and the answer in Case 4-CA-12404, the order consolidating cases and the consolidated complaint and notice of hearing and answers thereto in Cases 4-CA-12404 and 4-CB-4369, the order postponing hearing indefinitely, the stipulation of facts, and the Board and court proceedings in *Haddon House Food Products. (Haddon House I)*, [1] constitute the entire record in these cases. The parties also waived a hearing

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1. 242 NLRB 1057 (1979), enfd. 640 F.2d 392 (D.C. Cir. 1981); 260 NLRB 1060 (1982).

before, and the making of findings of fact and conclusions of law by, an administrative law judge, and the issuance of an administrative law judge's decision.

On 30 July 1982 the Board issued its order approving the stipulation and transferring these proceedings to the Board. Thereafter, counsel for the General Counsel, Respondent Employer, Respondent Local 30, and Charging Party Local 115 filed briefs in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record in these proceedings, and hereby makes the following:

Findings of Fact

I. The Business of Respondent Employer

Respondent Employer Haddon House Food Products, Inc. and Flavor Delight, Inc. have at all times material herein been New Jersey corporations and affiliated businesses located on the same premises in Medford, New Jersey, having a common management and labor relations policy, and constitute a single employer within the meaning of the Act. Respondent Employer is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of food products. During the past year, in the course and conduct of its business operations, Respondent Employer sold and shipped goods valued in excess of $50,000 directly to points outside the State of New Jersey.

The parties have stipulated, and we find, that Respondent Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organizations Involved

Local 80, Food and Allied Service Workers chartered by United Food and Commercial Workers, AFL-CIO is, and has been at all times materail herein, a labor organization within the meaning of Section 2(5) of the Act.

Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Facts*

On 19 November 1975 Charging Party Local 115 filed with the Board a representation petition in Case 4-RC-11923 seeking to represent certain production and warehouse employees of Respondent Employer. Pursuant to an unfair labor practice charge filed against Respondent Employer on 21 November 1975 by Charging Party Local 115 in Case 4-CA-7700, said representation petition has been held in abeyance and, at all times relevant herein, has continued to be held in abeyance, pending disposition of said unfair labor practice charge. At no time has said petition been dismissed or withdrawn.

On 12 June 1979, following issuance of an administrative law judge's decision in Case 4-CA-7700, the Board in *Haddon House I*[2] found that Respondent Employer had engaged in numerous violations of Section 8(a)(1) and (3) of the Act in response to its employees' organizational activities in support of Charging Party Local 115, and further violated Section 8(a)(1) and (3) by refusing to reinstate unfair labor practice strikers on their unconditional offer to return to work. In its remedy, the Board ordered, inter alia, a series of extraordinary

2. 242 NLRB 1057 (1979).

notice and access remedies, but declined to issue a bargaining order. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the District of Columbia.[3] On 4 November 1981, following denial of writs of certiorari by the United States Supreme Court, the court of appeals entered its judgment therein. Subsequently, on 22 December 1981 Respondent Employer filed with the Board a motion for reconsideration and modification of its Order in Case 4-CA-7700, and for reopening of the record and rehearing. On 19 March 1982 the Board denied Respondent Employer's motion.[4]

On or about 15 June 1981, during the pendency of the petition in Case 4-RC-11923 and the unfair labor practice proceedings in Case 4-CA-7700, Respondent Local 80 commenced union organizational efforts among Respondent Employer's employees through leafleting and meetings. On 29 June 1981 Respondent Local 80 demanded recognition from Respondent Employer as the exclusive bargaining representative of Respondent Employer's employees. On 8 July 1981, pursuant to a card check conducted on that date, the American Arbitration Association certified that a majority of Respondent Employer's production and warehouse employees desired representation by Respondent Local 80 for the purpose of collective bargaining. Charging Party Local 115 had no knowledge of this proceeding before The American Arbitration Association.[5] On or about 8 July 1981 Respondent Employer granted recognition to Respondent Local 80 as the exclusive representative

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3. 640 F.2d 392 (D.C. Cir. 1981). The court did not enforce that portion of the Board's Order requiring Respondent's manager and owner to personally read to employees the contents of the Board's notice.

4. 260 NLRB 1060 (1982).

5. Respondent Employer did not notify the American Arbitration Association that Charging Party Local 115 had filed a representation petition with the Board or that there were unremedied unfair labor practices found by the Board in Case 4-CA-7700.

of Respondent Employer's production and warehouse employees. Thereafter, on or about 24 July 1981 Respondent Employer and Respondent Local 80 entered into and, since said date, have maintained and given effect to collective-bargaining agreements covering the rates of pay, wages, hours of employment, and other terms and conditions of employment of Respondent Employer's production and warehouse employees.[6] These agreements contain, inter alia, the following provision:

Union Security

> All employees covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall maintain their membership in good standing, as a condition of employment, for the duration of this Agreement. All employees who are not members of the Union in good standing and all employees hired on or after the effective date of this Agreement shall, as a condition of employment, become members of the Union within 30 calendar days following the effective date of this Agreement or date of employment, whichever is the later, and thereafter shall maintain Union membership in good standing for the duration of this Agreement. For the purpose of this Agreement the term "good standing" is defined to refer only and be limited to the payment of Union membership dues and initiation fees.

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6. The collective-bargaining agreements set forth the following units:

> All production employees employed at Respondent Employer's Medford, New Jersey location, including packers and leadmen, excluding office employees, guards, salespersons and supervisors as defined in the National Labor Relations Act; and, All warehouse employees employed by Respondent Employer at its Medford, New Jersey location, including pickers, packers, general warehouse employees, and truck drivers, excluding office employees, guards, salespersons and supervisors as defined in the National Labor Relations Act.

At the time Respondent Employer granted recognition to, and entered into the collective-bargaining agreements with, Respondent Local 80, there was pending with the Board the representation petition in Case 4-RC-11923, and Respondent Employer had not fully remedied the unfair labor practices found by the Board in Case 4-CA-7700.[7] Respondent Local 80 assertedly had no knowledge of the aforesaid petition or unremedied unfair labor practices at the time it obtained recognition and entered into said collective-bargaining agreement. At all times relevant herein, Charging Party Local 115 has maintained a continuing interest in representing Respondent Employer's production and warehouse employees.

B. *Contentions of the Parties*

The General Counsel and Charging Party Local 115 contend that Respondent Employer violated Section 8(a)(1), (2), and (3) by granting recognition to and entering into a collective-bargaining agreement with Respondent Local 80 and by maintaining and giving effect to the union-security provision contained in said agreement. They contend further that Respondent Local 80 violated Section 8(b)(1)(A) and (2) by obtaining recognition from and entering into a collective-bargaining agreement with Respondent Employer and by maintaining and giving effect to the union-security provision contained therein. The General Counsel and Charging Party

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7. At the time of recognition and entry into the aforesaid collective-bargaining agreements, Respondent Employer had not complied fully with the Board's Order, as enforced by the United States Court of Appeals for the District of Columbia, in Case 4-CA-7700, inasmuch as it had not offered reinstatement to three unfair labor practice strikers and had failed to take other affirmative action set forth in said Order. Respondent Employer had complied partially in other respects by offering reinstatement and reinstating certain other employees and strikers.

Local 115 submit that the foregoing conduct was unlawful because it occurred at a time when Charging Party Local 115's representation petition was pending before the Board and while there was also pending the unfair labor practice proceedings pertaining to Respondent Employer's employees, which unfair labor practices remained unremedied at the time of recognition and entry into said collective-bargaining agreements. Respondent Employer contends[8] that its grant of recognition was lawful because it was undertaken pursuant to its employees' exercise of freedom of choice after a sufficient demonstration of an uncoerced majority in support of Respondent Local 80, and that invalidation of this collective-bargaining relationship may result in labor strife. Respondent Employer further contends that in view of the passage of time Charging Party Local 115's outstanding representation petition was stale and no longer raised a real question concerning representation. Respondent Local 80 contends that the petition, filed 6 years prior to the grant of recognition, should not preclude such recognition where it was undertaken pursuant to the majority support of Respondent Employer's employees and where Respondent Local 80 had no knowledge of the prior representation petition or any unremedied unfair labor practices on the part of Respondent Employer.

C. *Analysis and Conclusions*

In accordance with our decision in *Bruckner Nursing Home*, 262 NLRB 955 (1982), we find that Respondent Employer violated Section 8(a)(1) and (2) by granting recognition and entering into collective-bargaining agreements, and that Respondent Local 80

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8. Respondent Employer's motion for oral argument is hereby denied as the record and briefs adequately present the issues and positions of the parties.

violated Section 8(b)(1)(A)[9] by accepting recognition, at a time when a valid representation petition was pending with respect to the production and warehouse employees at issue. As we noted in *Bruckner Nursing Home*, once notified of a valid petition in an initial organizing situation, as here, an employer *must* refrain from recognizing any rival union. While we fully recognize that the factual context arising herein is somewhat unusual — inasmuch as the representation petition was held in abeyance or "blocked" for several years by the filing and litigation of a meritorious unfair labor practice charge — the resolution of the representation issue through a Board election rather than through employer recognition equally is essential under the circumstances herein. Despite the prolonged nature of the unfair labor practice proceedings, the essential facts remain that Charging Party Local 115 had substantial employee support when its petition was filed, that its petition was still pending before the Board when the unlawful recognition here was conferred, and that Charging Party Local 115 at all pertinent times maintained a continuing interest in representing Respondent Employer's employees.[10] Accordingly, notwithstanding the passage of several years, it is paramount that resolution of the question concerning

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9. By accepting the benefits of such unlawful recognition, we find that Respondent Local 80 violated Sec. 8(b)(1)(A) irrespective of its good-faith lack of knowledge of the pending representation petition or the unremedied unfair labor practices. See *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961); *Bristol Consolidators*, 239 NLRB 602 (1978).

10. The parties stipulated that Charging Party Local 115 maintained a continuing interest in representing these employees. It should also be noted that, while a majority of the Board declined to issue a bargaining order in Case 4-CA-7700, Charging Party Local 115 petitioned the United States Supreme Court for certiorari seeking a bargaining order in that case, thereby evincing a continued interest in representing Respondent Employer's employees concurrent with the grant of recognition to Respondent Local 80.

representation be resolved ultimately by the Board's election processes rather than by an employer's usurpation of this function by virtue of its own grant of recognition to one of two rival unions. While this may result in a prolonged period during which employees may be without desired representation, the alternative — to permit a private conferral of recognition apart from the Board's representation processes once the petition has been placed in abeyance — would encourage delay in the administration of concurrent unfair labor practice proceedings, would encourage circumvention of the Board's election processes, and would erode substantially the viability of the Board's essential and longstanding "blocking" policy customarily applied when unfair labor practice charges are filed concurrent with the filing of a representation petition. *Edwin J. Schlachter Meat Co.*, 100 NLRB 1171 (1952); *Todd Shipyards Corp.*, 5 NLRB 20, 25 (1938).[11] In short, so long as a valid representation petition seeking to represent an employer's employees remains outstanding and has not been withdrawn or dismissed, the prolonged litigation of a concurrent unfair labor practice proceeding involving the same employer cannot serve to invalidate the strict requirement of employer neutrality set forth in *Bruckner Nursing Home*.

Further, in view of the existence of unremedied unfair labor practices of an "outrageous and pervasive" character found in *Haddon House I* as "likely to have a continuing coercive effect on the free exercise by employees of their Section 7 rights long after the violations have occurred,"[12] it is evident that Respondent Local 80 cannot be deemed to have represented an uncoerced majority of Respondent Employer's employees at the time of

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11. In agreeing with the result in this case, Member Hunter does not pass on the continued validity of the Board's so-called blocking policy.

12. *Haddon House Food Products*, above at 1058.

recognition. Accordingly, conferral of recognition by Respondent Employer in these circumstances, accompanied by Charging Party Local 115's continued interest in representing these employees, violated the Act. *Riviera Manor Nursing Home,* 220 NLRB 124, 125 (1975).

Finally, as Respondent Employer and Respondent Local 80 have executed collective-bargaining agreements containing a union-security provision and have given effect to such provision, such conduct further violates Section 8(a)(3) and Section 8(b)(2) of the Act, respectively, *Bristol Consolidators,* above.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth in section III, above, occurring in connection with the operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Haddon House Food Products, Inc. and Flavor Delight, Inc. are a single employer within the meaning of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 80, Food and Allied Service Workers chartered by United Food and Commercial Workers, AFL-CIO and Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Respondent Local 80 as the exclusive bargaining representative of its production and

warehouse employees and by entering into and maintaining in effect collective-bargaining agreements covering the rates of pay, wages, hours of employment, and other terms and conditions of employment, which agreements include a union-security provision, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act.

4. By obtaining recognition as the exclusive bargaining representative of Respondent Employer's production and warehouse employees and by entering into and maintaining in effect collective-bargaining agreements covering the rates of pay, wages, hours of employment, and other terms and conditions of employment, which agreements include a union-security provision, Respondent Local 80 has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) and that Respondent Local 80 has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2), we shall order them, respectively, to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In order to remedy the effects of the unfair labor practices discussed above, we shall order Respondent Employer to withdraw and withhold all recognition from Respondent Local 80 as the collective-bargaining representative of Respondent Employer's production and warehouse employees, at its Medford, New Jersey location, and cease giving any force or effect to any

collective-bargaining agreement with Respondent Local 80 covering such employees, or to any modifications, extensions, supplements, or renewals of such contract or contracts, unless and until Respondent Local 80 shall have been certified as bargaining representative pursuant to a Board-conducted election among such employees of Respondent Employer in a unit or units appropriate for collective bargaining. Further, we shall order Respondent Local 80 to withdraw from acting as bargaining representative of the aforesaid employees or giving any force or effect to such aforesaid bargaining agreements, unless and until Respondent Local 80 shall have been certified as bargaining representative pursuant to a Board-conducted election. However, nothing in the Order set forth hereinafter shall be construed to authorize or require Respondent Employer to withdraw or eliminate any wage increase or other benefits or terms and conditions of employment which may have been established pursuant to that agreement or agreements, except with respect to those agreements' union-security provision which may no longer be enforced. Respondents will be required jointly and severally to reimburse all present and former employees for all initiation fees, dues, or other moneys paid pursuant to the unlawful union-security agreement with interest thereon to be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

As noted previously herein, in *Haddon House I* we ordered Respondent Employer to undertake a series of extraordinary notice and access remedies in order to effectuate the policies of the Act. Those remedies stemmed from the commission of egregious unfair labor practices committed by Respondent Employer in 1975, approximately 6 years prior to the unfair labor practices found in the instant proceeding. The access remedies ordered therein were to run for a period of 2 years from the date the required notice was posted in *Haddon House I*. In these circumstances, and noting that the record fails to

establish that Respondent Employer complied fully with the full scope of remedies ordered in *Haddon House I* prior to the commission of the unfair labor practices found herein, we shall order that the access remedies ordered in *Haddon House I* be extended for an additional 2-year period from the date the required notice ordered in this proceeding is posted.[13] However, as it is evident that the unfair labor practices found in the instant proceeding are not as pervasive as those arising in *Haddon House I*, we shall not require Respondent Employer to engage in the full panoply of extraordinary remedies therein.[14]

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13. We view this extension of the 2-year access period as necessary in order to render meaningful the extraordinary remedies ordered in *Haddon House I*. As the unfair labor practices found in the instant proceeding antedated full compliance in *Haddon House I*, extension of the access period is necessary to effectuate the policies of the Act and is analogous to extension of certification year under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Thus, even assuming that Charging Party Local 115 may be granted access to Respondent Employer's facility prior to compliance in the instant proceeding, such access is of limited practical significance in remedying the violations found in *Haddon House I* if it should occur while Respondent Local 80 is the recognized bargaining representative operating under a collective-bargaining agreement. Unless and until Respondents cease such recognition and application of their collective-bargaining agreement, as well as undertake the other remedies ordered herein, the remedial access provisions are likely to be ineffective if undertaken contemporaneous with the entrenched presence of a rival labor organization. Further, in view of the prolonged unlawful presence of Respondent Local 80 as recognized bargaining representative, we are persuaded that an extension of the remedial access remedy ordered *Haddon House I* will not compromise the Board's election processes, should such an election occur in the future, inasmuch as these limited access requirements are intended, as near as possible, to return the parties to the status quo existing prior to the commission of numerous unfair labor practices adversely affecting employees' exercise of Sec. 7 rights on behalf of Charging Party Local 115.

14. Member Zimmerman would order the full extent of remedies found appropriate in *Haddon House I*, except for the requirement that the Respondent Employer's manager and owner read the

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, we make the following

ORDER

The National Labor Relations Board hereby orders that

A. Respondent Haddon House Food Products, Inc. and Flavor Delight, Inc., Medford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting, aiding, supporting, recognizing, or negotiating with Local 80, Food and Allied Service Workers chartered by United Food and Commercial Workers, AFL-CIO, as the exclusive collective-bargaining representative of all production and warehouse employees employed at Respondent Employer's Medford, New Jersey location, unless and until such labor organization is certified by the Board as the exclusive collective-bargaining representative of said employees pursuant to Section 9(c) of the Act.

NOTES *(Continued)*

notice to the assembled employees. Accordingly, in addition to the remedies ordered by his colleagues, Member Zimmerman would require Respondent Employer to mail a copy of the appropriate Board notice to each and every employee at his or her home address and include a copy in appropriate company publications, publish in local newspapers of general circulation copies of the Board's notice twice weekly for a period of 4 weeks, and, on request of Charging Party Local 115 made within 1 year of the issuance of the Order here, make available to Local 115, without delay, a list of names and addresses of all employees employed at the time of the request. In addition, Member Zimmerman would include a broad cease-and-desist order requiring Respondent Employer to cease from in any other manner interfering with, restraining, or coercing employees in the exercise of their Sec. 7 rights.

(b) Entering into, maintaining, enforcing, or giving effect to any collective-bargaining agreement with Local 80, Food and Allied Service Workers, dated 24 July 1981, pertaining to production and warehouse employees at its Medford, New Jersey location or any extension, renewal, or modification thereof; provided, however, that nothing in this Order shall authorize, allow, or require the withdrawal or elimination of any wage increases or other benefits which may have been established pursuant to such agreement.

(c) Requiring as a condition of employment that all production and warehouse employees at Respondent Employer's Medford, New Jersey location who are members of Local 80, Food and Allied Service Workers, remain members in good standing, or that those employees who are not members shall become members, as a condition of employment, within 30 calendar days following their date of employment or effective date of a collective-bargaining agreement and thereafter maintain their membership in good standing.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Withdraw and withhold all recognition from Local 80, Food and Allied Service Workers, as the collective-bargaining representative of its production and warehouse employees at their Medford, New Jersey location, unless and until

said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 80, Food and Allied Service Workers, reimburse all present and former production and warehouse employees employed at its Medford, New Jersey location for all initiation fees, dues, assessments, or any other moneys which may have been paid by or withheld from them pursuant to the aforesaid collective-bargaining agreements, together with interest on the moneys due to be computed in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of all union dues, initiation fees, assessments, or other moneys which have been paid to Local 80, Food and Allied Service Workers, and are subject to reimbursement to employees under the terms of this Order.

(d) Post at its location in Medford, New Jersey, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and

15. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Immediately upon request of Teamsters Local 115, for a period of 2 years from the date on which the aforesaid notice is posted, grant Teamsters Local 115 and its representatives reasonable access to plant bulletin boards and all places where notices to employees are customarily posted.

(f) Immediately upon request of Teamsters Local 115, for a period of 2 years from the date on which the aforesaid notice is posted, permit a reasonable number of union representatives access for reasonable periods of time to nonwork areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within its Medford, New Jersey location, so that Teamsters Local 115 may present its views on unionization to employees orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

(g) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, any supervisor or agent of Respondent Employer convenes any group of employees at its Medford, New Jersey location and addresses them on the question of union representation, give Teamsters Local 115 reasonable notice thereof and afford the representative of Teamsters Local 115 a reasonable opportunity to be present at such speech, and, on request, give one of them equal time and facilities to address

the employees on the question of union representation.

(h) In any election which the Board may schedule at Respondent Employer's Medford, New Jersey location within a period of 2 years following the date on which the aforesaid notice is posted, and in which Teamsters Local 115 is a participant, permit, on request of Teamsters Local 115, at least two of its representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Local 80, Food and Allied Service workers chartered by United Food and Commercial Workers, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as exclusive bargaining representative of the production and warehouse employees employed at Respondent Employer's Medford, New Jersey location, for the purposes of collective bargaining, unless and until such labor organization shall have been certified by the Board as the collective-bargaining representative of said employees pursuant to Section 9(c) of the Act.

(b) Entering into, maintaining, enforcing, or giving effect to any collective-bargaining agreement with Respondent Employer dated 24 July 1981 pertaining to Respondent Employer's

production and warehouse employees at its Medford, New Jersey location, or any extension, renewal, or modification thereof.

(c) Requiring as a condition of employment that all production and warehouse employees at Respondent Employer's Medford, New Jersey location, who are members of said labor organization, remain members in good standing, or that those employees who are not members shall become members, as a condition of employment, within 30 calendar days following their date of employment or effective date of a collective-bargaining agreement and thereafter maintain their membership in good standing.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Employer reimburse all present and former production and warehouse employees employed at Respondent Employer's Medford, New Jersey location for all initiation fees, dues, assessments, or any other moneys which may have been paid or withheld from them pursuant to the aforesaid collective-bargaining agreements, together with interest on the moneys due to be computed in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Post at its locations in Medford, New Jersey, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms

16. See fn. 15, above.

provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward to the Regional Director for Region 4 signed copies of the aforesaid notice for posting by Respondent Employer at its Medford, New Jersey location for 60 consecutive days in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 23 March 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT assist, aid, support, recognize, or negotiate with Local 80, Food and Allied Service Workers, as the collective-bargaining representative of employees at our Medford, New Jersey location, unless and until that labor organization is certified by the National Labor Relations Board to act as such representative.

WE WILL NOT enter into, maintain, enforce, or give effect to any collective-bargaining agreement with Local 80, Food and Allied Service Workers, at our Medford, New Jersey location, including the agreement dated 24 July 1981, or any extension, renewal, or modification thereof; provided that WE WILL NOT withdraw or eliminate any wage increases or other benefits which have been put into effect as a result of any such agreement.

WE WILL NOT require, as a condition of employment, that employees at our Medford, New Jersey location become or remain members of Local 80, Food and Allied Service Workers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from Local 80, Food and Allied Service Workers, as the collective-bargaining representative of employees at our Medford, New Jersey location, unless and until that labor organization is certified by the National Labor Relations Board.

WE WILL jointly and severally with Local 80, Food and Allied Service Workers, reimburse all former and present employees at our Medford, New Jersey location

for any initiation fees, dues, assessments, or any other moneys which may have been paid by or withheld from them under our contract with Local 80, Food and Allied Service Workers, plus interest.

WE WILL, immediately on request of Teamsters Local Union No. 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, grant it and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately on request of Teamsters Local 115, grant it and its representatives reasonable access to our plant in nonwork areas during employees' nonwork time in order that Teamsters Local 115 may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give Teamsters Local 115 reasonable notice and give two of their representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

WE WILL, in any election which the Board may schedule at our plant and in which Teamsters Local 115 is a participant, permit, on request by Teamsters Local 115, at least two of their representatives reasonable access to the plant and appropriate facilities to speak to you for 30 minutes on working time, not more than 10 working days, but not less than 48 hours prior to the election.

WE WILL apply at our Medford, New Jersey location the four paragraphs immediately preceding this one for a period of 2 years from the date of posting of this notice, or until the National Labor Relations Board certifies the results of a fair and free election, whichever comes first.

Our employees have the right to join any labor organization, or to refrain from doing so.

HADDON HOUSE FOOD PRODUCTS, INC. AND FLAVOR DELIGHT, INC.

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Independence Mall, Seventh Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT act as the collective-bargaining representative of employees employed at Haddon House Food Products, Inc. and Flavor Delight, Inc.'s location in Medford, New Jersey, unless and until we are certified by the National Labor Relations Board to act as such representative.

WE WILL NOT enter into, maintain, enforce, or give effect to any collective-bargaining agreement with Haddon House Food Products, Inc. and Flavor Delight, Inc., at its Medford, New Jersey location, including the agreement dated 24 July 1981 or any extension, renewal, or modification thereof, and WE WILL NOT seek the withdrawal or elimination of any wage increases, or other benefits which have been put into effect as a result of any such agreement.

WE WILL NOT require that employees employed at Haddon House Food Products, Inc. and Flavor Delight, Inc.'s location at Medford, New Jersey, as a condition of employment, become or remain members of our labor organization.

WE WILL NOT in any like or related manner restrain or coerce employees and/or members in the rights guaranteed them by Section 7 of the Act.

WE WILL jointly and severally with Haddon House Food Products, Inc. and Flavor Delight, Inc. reimburse all former and present employees employed at its Medford, New Jersey location for any initiation fees, dues, assessments, or any other moneys which may have been paid or withheld from them under our contract with

Haddon House Food Products, Inc. and Flavor Delight, Inc., plus interest.

LOCAL 80, FOOD AND ALLIED SERVICE WORKERS CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO

_____
(Labor Organization)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Independence Mall, Seventh Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-861

In the Supreme Court of the United States

OCTOBER TERM, 1985

HADDON HOUSE FOOD PRODUCTS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act by recognizing a union which, due to petitioner's unremedied unfair labor practices, did not represent an uncoerced majority of petitioner's employees.

2. Whether the Board properly found, alternatively, that petitioner violated Section 8(a)(1), (2) and (3) of the Act by according recognition to one union, in an initial organizing campaign, when another union had filed a valid representation petition with the Board.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is reported at 764 F.2d 182. The decision and order of the National Labor Relations Board (Pet. App. A16-A41) are reported at 269 N.L.R.B. 338.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1985. A petition for rehearing was denied on August 22, 1985 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

1. In November 1975, Teamsters Local Union No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, obtained signed authorization cards from 27 of petitioner's 56 employees.[1] On November 19, 1975, Local 115 filed a petition for a representation election with the Board. This petition was never dismissed or withdrawn, although the Board did hold it in abeyance because of unfair labor practice charges filed by Local 115 against petitioner on November 21, 1975. Pet. App. A6.

A complaint was issued, and a hearing held, on the charges filed by Local 115. The Board found that petitioner had engaged in numerous independent violations of Section 8(a)(1) of the Act and had violated Section 8(a)(1) and (3) by discharging eight employees because of their union activities and refusing to reinstate 14 unfair labor practice strikers. The Board ordered petitioner: (i) to cease and desist from these unfair labor practices and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights; and (ii) to offer reinstatement, with backpay, to the 22 employees unlawfully discharged or denied reinstatement. *Haddon House Food Products, Inc.*, 242 N.L.R.B. 1057, 1057-1059, 1065-1069, 1073 n.5, 1075 (1979).

The Board further concluded, however, that these standard measures were inadequate to remedy petitioner's "extraordinary violations" (242 N.L.R.B. at 1059 n.11), which the Board found "[were] such that they [were] likely to have a continuing coercive effect on the free exercise by employees of their [statutory] rights long after the violations * * * occurred" (*id.* at 1058). For this reason, the

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[1] The two employers in this case, Haddon House Food Products, Inc. and Flavor Delight, Inc., are under common ownership and management, and they accordingly will be referred to herein as "petitioner."

Board also provided certain additional remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [petitioner's] unlawful conduct and to insure that if the question of union representation [were] placed before employees in the future they [would] be able to voice a free choice" (*ibid.*).[2]

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[2] Specifically, the Board ordered petitioner to take the following steps (242 N.L.R.B. at 1058-1059 (footnotes omitted)):

> (1) in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, include it in the appropriate company publications and mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by [petitioner's] owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose. [Petitioner] shall afford the Board a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice; (2) publish in local newspapers of general circulation a copy of the above notice two times per week for a period of 4 weeks; (3) upon request, grant [Local 115] and its representatives reasonable access to [its] bulletin boards and all places where notices to employees are customarily posted; (4) upon request, grant [Local 115] reasonable access to [its] plant in nonwork areas during employees' nonwork time; (5) supply [Local 115], upon request made within 1 year of the date of this Decision and Order, the names and addresses of [its] current employees; (6) give notice of, and equal time and facilities for [Local 115] to respond to, any address made by [petitioner] to [its] employees on the question of union representation; and (7) afford [Local 115] the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which [it] is a participant. Provisions (3), (4), (6) and (7), above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

On January 26, 1981, the Court of Appeals for the District of Columbia Circuit upheld the Board's unfair labor practice findings and enforced its remedial order with but one modification (*Teamsters Local 115* v. *NLRB*, 640 F.2d 392), observing that petitioner's conduct "constituted 'a well-orchestrated antiunion campaign that featured repeated and egregious violations' " (*id.* at 395, quoting 242 N.L.R.B. at 1061 (Chairman Fanning and Member Jenkins, concurring and dissenting)).[3] The court of appeals sustained the Board's refusal to issue an order requiring petitioner to bargain with Local 115, despite the pervasive nature of petitioner's unfair labor practices. The court so ruled because, although Local 115 had demonstrated that it had the support of 27 of the 54 or 55 employees in the bargining unit, t[illegible]pport fell short of actual majority status. *Id.* at 395-[illegible]th petitioner and Local 115 filed petitions for a writ of certiorari, which this Court denied on October 5, 1981. 454 U.S. 827, 837.[4]

2. On or about June 15, 1981 -- while the petitions for a writ of certiorari were pending in this Court and before petitioner had complied with the Board's remedial order that had been enforced by the court of appeals -- Local 80, Food and Allied Service Workers, chartered by the United Food and Commercial Workers, AFL-CIO, commenced its own organizational campaign among petitioner's employees. On July 8, 1981, the American Arbitration Association, after conducting a check of authorization cards signed by employees, certified that a majority of the

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[3] The District of Columbia Circuit declined to enforce the requirement that petitioner's owner personally read the notice to the assembled employees (see note 2, *supra*), holding instead that any responsible officer of petitioner could read the notice. 640 F.2d at 403-404.

[4] Local 115 sought review of the court of appeals' decision insofar as it sustained the Board's refusal to issue a bargaining order in the absence of evidence that Local 115 had ever achieved majority status. Petitoner sought review of the extraordinary remedial measures which were enforced by the District of Columbia Circuit.

employees desired representation by Local 80. However, Local 115 was not notified of the card check, and the American Arbitration Association was not notified of Local 115's pending election petition or of petitioner's unremedied unfair labor practices (Pet. App. A20 & n.5).

After the card check, petitioner recognized Local 80 as the exclusive bargaining representative of its production and warehouse employees. Thereafter, on or about July 24, 1981, petitioner and Local 80 entered into separate collective bargaining agreements for each of the two groups of employees; each agreement contained a union-security clause. At the time of its recognition of Local 80 and execution of the contracts, petitioner had offered reinstatement to 19 of the 22 employees entitled to reinstatement under the Board's previous order, but had not complied with any of the extraordinary remedial provisions of that order. At all relevant times, Local 115 maintained a continuing interest in representing petitioner's production and warehouse employees—as evidenced by its then-pending petition for a writ of certiorari seeking review of the denial of a bargaining order—and Local 80 assertedly had no knowledge of Local 115's pending representation petition or petitioner's unremedied unfair labor practices. Pet. App. A20-A22 & n.7, A24 & nn.9, 10.

The Board found that petitioner violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. 158(a)(1), (2) and (3)) by recognizing Local 80 and entering into the collective bargaining agreements containing union-security clauses.[5] These findings rested on two independent grounds. First, the Board relied on the fact that Local 115's valid election

[5] The Board also found that Local 80 violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into contracts containing union-security clauses. These findings also were affirmed by the court of appeals, on the same grounds upon which the court affirmed the findings against petitioner (see pages 6-7, *infra*). Local 80, whose recognitional rights are at stake in this case, has not sought review in this Court.

unit sought by Local 115. On June 29, Local 80 demanded recognition as the exclusive bargaining representative of the Company's employees. Pursuant to a card check conducted by James L. Marchese, Assistant Regional Director of the American Arbitration Association, certifying Local 80's majority support, Haddon House recognized Local 80. (A. 20). At this time, the Company had not complied with the order in *Haddon House I;* three employees had not been offered reinstatement and the Company had not offered Local 115 any of the access remedies required by the Board. (A. 22).

On or about July 24, 1981, the Company and Local 80 executed a collective bargaining agreement covering the rates of pay, wages, hours of employment and other terms and conditions of employment of employees in separate bargaining units of production and warehouse employees. Article VI of the contract is a union security clause:

> All employees covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall maintain their membership in good standing, as a condition of employment, for the duration of this Agreement. All employees who are not members of the Union in good standing and all employees hired on or after the effective date of this Agreement shall, as a condition of employment, become members of the Union within 30 calendar days following the effective date of this Agreement or date of employment, whichever is the later, and thereafter shall maintain Union membership in good standing for the duration of this Agreement. For purpose of this Agreement the term "good standing" is defined to refer only and to be limited to the payment of Union membership dues and initiation fees.

The Company and Local 80 have "given effect to" this union security clause. (A. 21).

Local 115 was unaware of Local 80's organizing campaign and of the proceeding before the American Arbitration Association. The Company did not notify the Association that Local 115 had filed a representation petition which was being held in abeyance or

that it had not yet remedied all the unfair labor practices found by the Board and enforced by the Court of Appeals. (A. 20, 22).

When the Company recognized Local 80 and executed the collective bargaining agreement, it had not complied with several provisions of the Board order as enforced by the court in *Haddon House I*. Specifically, the Company had failed to offer reinstatement to three employees classified as unfair labor practice strikers and had failed to take most of the affirmative action required by the Order. (A. 22).

At the time Local 115 filed its representation petition with the Board and demanded recognition from the Company, it had an interest in representing the Company's employees. *Haddon House I, supra*., 242 NLRB at 1058, n. 7. Local 115's interest in representing the employees continued uninterrupted thereafter. (A. 22).

The Supreme Court denied both Local 115's and the Company's Petitions for a Writ of Certiorari on October 5, 1981.

On December 22, 1981, the Company urged the Board to reconsider the remedies granting Local 115 access to its premises, because the Company had already recognized Local 80 as the bargaining agent of its employees. Thus, the Employer argued, "the present composition of the Board's Order in several important instances has become either moot, irrelevant to the current factual setting or inapposite to the Board's remedial mandate of effectuating the policies and purposes of the Act." (A. 214-226). The Board denied the motion because the court order deprived it of jurisdiction to modify the order. *Haddon House Food Products, Inc.*, 260 NLRB 1080 (1982).

THE BOARD'S DECISION AND ORDER

On the record, the Board concluded that the Company violated Section 8(a)(1), (2) and (3) of the Act by extending recognition to and executing a contract containing a union security clause with Local 80 while Local 115's representation petition was pending, while Local 115 had a continuing interest in representing

the employees and while the Company's " 'outrageous and pervasive' " unfair labor practices remained unremedied. (A. 25-26). Because of the unremedied unfair labor practices, the Board concluded, "Local 80 cannot be deemed to have represented an uncoerced majority of [the] Employer's employees at the time of recognition." (A. 25).

To remedy these violations, the Board ordered the Company to withdraw and withhold recognition from Local 80, to cease effectuating any collective bargaining agreement between them, unless and until Local 80 is certified in a Board-conducted election. The Board ordered Local 80 to withdraw as bargaining representative of the affected employees until it is certified by the Board. At the same time, the Board ordered the Company and Local 80, jointly and severally, to refund to affected employees all union dues collected pursuant to the union security clause in their contract. To remedy the unremedied violations in *Haddon House I*, the Board ordered "that the access remedies order in *Haddon House I* be extended for an additional two-year period from the date the required notice ordered in this proceeding is posted." (A. 26-27).

The Third Circuit enforced the Board's Order, adopting both the *Bruckner Nursing Home* rationale and the finding that the employees were still suffering from coercion when the Company recognized Local 80.

ARGUMENT

THE PETITION RAISES NO ISSUE WORTHY OF RESOLUTION BY THE COURT

It is settled law that recognition of a union which lacks uncoerced majority support constitutes a violation of Section 8(a)(2) of the Act. *ILGWU v. NLRB*, 366 U.S. 731 (1961); *Paul O'Neill Int'l Detective Agency v. NLRB*, 280 F.2d 920, 930 n. 2, 930-940 (3d Cir. 1960); *NLRB v. Jon Power, Inc.*, 421 F.2d 1050, 1061-1062 (9th Cir. 1970). The Petition does not suggest a single court which has rejected the proposition that employees selecting

a union must do so voluntarily and without coercion by either a union or thir employer.

The Petion utterly fails to address the Board's finding (A. 25-26), enfrced by the Third Circuit (A. 13-14), that the employees were not free from the effects of the 1975 unfair labor practices *atthe time* the Company recognized Local 80. This failure in understandable for the parties have stipulated that the Company hd not yet offered to reinstate three unfair labor practice strikersand, perhaps more importantly, had not begun to comply wit the access provisions required by *Haddon House I.* (A. 28). In *Iaddon House I,* the Board concluded that the Company's "unfir labor practices are such that they are likely to have a continuing oercive effect on the free exercise by employees of their Sectio 7 rights long after the violations have occurred ..." Thus, the loard created a series of extraordinary remedies "to dissipate asmuch as possible the lingering atmosphere of fear created by [he Company's] unlawful conduct and to insure that if the questionof union representation is placed before employees in the future tey will be able to voice a free choice." 242 NLRB at 1058. Geard to the eventual scheduling of Local 115's pending representaton petition, these affirmative remedies required the Company t

> (3) upo request, grant the Union and its representatives reasonale access to its bulletin boards and all places where otices to employees are customarily posted; (4) upon quest, grant the Union reasonable access to its plant inonwork areas during employees' nonwork time; (5) supy the Union, upon request made within 1 year of the da of this Decision and Order, the names and addresseof its current employees; (6) give notice of, and equal ne and facilities for the Union to respond to, any addresmade by Respondent to its employees on the question ofnion representation; and (7) afford the Union the right to deliver a 30-minute speech to employees on worktime prior to any Board election which may be scheduled in which the Union is a participant. Provisions (3), (4)(6), and (7), above, shall apply for a period of 2

> years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

242 NLRB at 1058-1059 (footnotes omitted). Clearly the Board contemplated an election within the next two years, after its remedial order had dissipated the effect of the Company's egregious and pervasive unfair labor practices.

Indeed, the District of Columbia Circuit agreed that these remedies "would restore the employee confidence necessary to permit a free and untrammeled representation decision." The court affirmed the access remedies, concluding that they were "designed to assist [Local 115] in communicating with the employees in hearing [Local 115's] side of the story without fear of retaliation." *Haddon House I, supra*, 640 F.2d at 399-400.

When the Company recognized Local 80, Local 115 and the Company's employees had received no benefit from these access remedies. The Third Circuit reasonably concluded, "The Board's finding that the effects of the 1975 unfair labor practices made unfettered employee free choice unlikely while those practices remained unremedied is supported by substantial evidence in the record as a whole." (A. 13-14).

Because the Board's and the Third Circuit's opinions are based upon two independent rationales, the Company's failure to challenge the "coerced majority" rationale renders the attack on *Bruckner Nursing Home*, 262 NLRB 955 (1982), moot. Even if reliance upon *Bruckner* were misplaced, the Third Circuit's judgment would nonetheless remain valid.

CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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Dated: December 16, 1985

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Local 115's Opposition To Petition For Writ Of Certiorari have been mailed first-class, postage prepaid this 16th day of December, 1985 to the following:

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Supreme Court, U.S.
FILED
JAN 31 1986
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No. 85-861

In the Supreme Court of the United States

OCTOBER TERM, 1985

HADDON HOUSE FOOD PRODUCTS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act by recognizing a union which, due to petitioner's unremedied unfair labor practices, did not represent an uncoerced majority of petitioner's employees.

2. Whether the Board properly found, alternatively, that petitioner violated Section 8(a)(1), (2) and (3) of the Act by according recognition to one union, in an initial organizing campaign, when another union had filed a valid representation petition with the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is reported at 764 F.2d 182. The decision and order of the National Labor Relations Board (Pet. App. A16-A41) are reported at 269 N.L.R.B. 338.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1985. A petition for rehearing was denied on August 22, 1985 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

1. In November 1975, Teamsters Local Union No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, obtained signed authorization cards from 27 of petitioner's 56 employees.[1] On November 19, 1975, Local 115 filed a petition for a representation election with the Board. This petition was never dismissed or withdrawn, although the Board did hold it in abeyance because of unfair labor practice charges filed by Local 115 against petitioner on November 21, 1975. Pet. App. A6.

A complaint was issued, and a hearing held, on the charges filed by Local 115. The Board found that petitioner had engaged in numerous independent violations of Section 8(a)(1) of the Act and had violated Section 8(a)(1) and (3) by discharging eight employees because of their union activities and refusing to reinstate 14 unfair labor practice strikers. The Board ordered petitioner: (i) to cease and desist from these unfair labor practices and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights; and (ii) to offer reinstatement, with backpay, to the 22 employees unlawfully discharged or denied reinstatement. *Haddon House Food Products, Inc.*, 242 N.L.R.B. 1057, 1057-1059, 1065-1069, 1073 n.5, 1075 (1979).

The Board further concluded, however, that these standard measures were inadequate to remedy petitioner's "extraordinary violations" (242 N.L.R.B. at 1059 n.11), which the Board found "[were] such that they [were] likely to have a continuing coercive effect on the free exercise by employees of their [statutory] rights long after the violations * * * occurred" (*id.* at 1058). For this reason, the

[1] The two employers in this case, Haddon House Food Products, Inc. and Flavor Delight, Inc., are under common ownership and management, and they accordingly will be referred to herein as "petitioner."

Board also provided certain additional remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [petitioner's] unlawful conduct and to insure that if the question of union representation [were] placed before employees in the future they [would] be able to voice a free choice" (*ibid.*).[2]

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[2] Specifically, the Board ordered petitioner to take the following steps (242 N.L.R.B. at 1058-1059 (footnotes omitted)):

> (1) in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, include it in the appropriate company publications and mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by [petitioner's] owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose. [Petitioner] shall afford the Board a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice; (2) publish in local newspapers of general circulation a copy of the above notice two times per week for a period of 4 weeks; (3) upon request, grant [Local 115] and its representatives reasonable access to [its] bulletin boards and all places where notices to employees are customarily posted; (4) upon request, grant [Local 115] reasonable access to [its] plant in nonwork areas during employees' nonwork time; (5) supply [Local 115], upon request made within 1 year of the date of this Decision and Order, the names and addresses of [its] current employees; (6) give notice of, and equal time and facilities for [Local 115] to respond to, any address made by [petitioner] to [its] employees on the question of union representation; and (7) afford [Local 115] the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which [it] is a participant. Provisions (3), (4), (6) and (7), above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

On January 26, 1981, the Court of Appeals for the District of Columbia Circuit upheld the Board's unfair labor practice findings and enforced its remedial order with but one modification (*Teamsters Local 115* v. *NLRB*, 640 F.2d 392), observing that petitioner's conduct "constituted 'a well-orchestrated antiunion campaign that featured repeated and egregious violations' " (*id.* at 395, quoting 242 N.L.R.B. at 1061 (Chairman Fanning and Member Jenkins, concurring and dissenting)).[3] The court of appeals sustained the Board's refusal to issue an order requiring petitioner to bargain with Local 115, despite the pervasive nature of petitioner's unfair labor practices. The court so ruled because, although Local 115 had demonstrated that it had the support of 27 of the 54 or 55 employees in the bargining unit, that support fell short of actual majority status. *Id.* at 395-396. Both petitioner and Local 115 filed petitions for a writ of certiorari, which this Court denied on October 5, 1981. 454 U.S. 827, 837.[4]

2. On or about June 15, 1981—while the petitions for a writ of certiorari were pending in this Court and before petitioner had complied with the Board's remedial order that had been enforced by the court of appeals—Local 80, Food and Allied Service Workers, chartered by the United Food and Commercial Workers, AFL-CIO, commenced its own organizational campaign among petitioner's employees. On July 8, 1981, the American Arbitration Association, after conducting a check of authorization cards signed by employees, certified that a majority of the

[3] The District of Columbia Circuit declined to enforce the requirement that petitioner's owner personally read the notice to the assembled employees (see note 2, *supra*), holding instead that any responsible officer of petitioner could read the notice. 640 F.2d at 403-404.

[4] Local 115 sought review of the court of appeals' decision insofar as it sustained the Board's refusal to issue a bargaining order in the absence of evidence that Local 115 had ever achieved majority status. Petitoner sought review of the extraordinary remedial measures which were enforced by the District of Columbia Circuit.

employees desired representation by Local 80. However, Local 115 was not notified of the card check, and the American Arbitration Association was not notified of Local 115's pending election petition or of petitioner's unremedied unfair labor practices (Pet. App. A20 & n.5).

After the card check, petitioner recognized Local 80 as the exclusive bargaining representative of its production and warehouse employees. Thereafter, on or about July 24, 1981, petitioner and Local 80 entered into separate collective bargaining agreements for each of the two groups of employees; each agreement contained a union-security clause. At the time of its recognition of Local 80 and execution of the contracts, petitioner had offered reinstatement to 19 of the 22 employees entitled to reinstatement under the Board's previous order, but had not complied with any of the extraordinary remedial provisions of that order. At all relevant times, Local 115 maintained a continuing interest in representing petitioner's production and warehouse employees—as evidenced by its then-pending petition for a writ of certiorari seeking review of the denial of a bargaining order—and Local 80 assertedly had no knowledge of Local 115's pending representation petition or petitioner's unremedied unfair labor practices. Pet. App. A20-A22 & n.7, A24 & nn.9, 10.

The Board found that petitioner violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. 158(a)(1), (2) and (3)) by recognizing Local 80 and entering into the collective bargaining agreements containing union-security clauses.[5] These findings rested on two independent grounds. First, the Board relied on the fact that Local 115's valid election

[5] The Board also found that Local 80 violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into contracts containing union-security clauses. These findings also were affirmed by the court of appeals, on the same grounds upon which the court affirmed the findings against petitioner (see pages 6-7, *infra*). Local 80, whose recognitional rights are at stake in this case, has not sought review in this Court.

petition was still pending when petitioner recognized Local 80. For this reason, the Board held that petitioner's recognition of Local 80 was contrary to the Board's decision in *Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982), which bars an employer from granting initial recognition to a union after a rival union has filed a valid election petition (Pet. App. A23-A25). Second, in view of the continuing coercive effect of petitioner's unremedied unfair labor practices, the Board found that Local 80 could not be deemed to have represented an uncoerced majority of petitioner's employees at the time of recognition (Pet. App. A25-A26).

On these alternative grounds, the Board ordered petitioner to cease and desist from the unfair labor practices and from otherwise interfering with, restraining or coercing its employees in the exercise of their statutory rights; to withdraw and withhold recognition from Local 80 until and unless Local 80 is certified by the Board; to reimburse employees, jointly and severally with Local 80, for all initiation fees, dues, assessments, or other payments made pursuant to the contractual union-security clauses; to grant Local 115, for a period of 2 years, the right of access as set forth in the Board's previous order (see note 2, *supra*); and to post appropriate notices (Pet. App. A27-A39).

3. The Court of Appeals for the Third Circuit enforced the Board's order, sustaining both of the grounds relied upon by the Board in finding petitioner's recognition of Local 80 to be unlawful (Pet. App. A3-A15). The court held that the Board's *Bruckner* policy was "a satisfactory accommodation of the sometimes conflicting policies of prompt recognition of majority collective bargaining representatives and of uncoerced free choice in the selection of such representatives" (*id.* at A12) and that the policy was consistent with prior Third Circuit decisions (*id.* at A12-A13). The court of appeals further held that substantial evidence in the record as a whole supported the Board's finding that Local 80 did not represent an uncoerced majority of petitioner's employees, because the

lingering effects of its prior unfair labor practices made unfettered employee free choice unlikely so long as those unfair labor practices remained unremedied (*id.* at A13-A14).

ARGUMENT

1. Petitioner challenges the Board's position, enunciated in *Bruckner Nursing Home, supra,* and upheld by the court of appeals, that the pendency of Local 115's election petition precluded it from according initial recognition to Local 80 irrespective of whether Local 80 represented an uncoerced majority of the unit employees. However, as the court of appeals concluded (Pet. App. A9), the Board's finding, also upheld by the court of appeals, that Local 80 in fact did not represent an uncoerced majority of the unit employees is dispositive of this case. Petitioner does not challenge that finding here. Indeed, in the prior proceedings, the Board specifically found that petitioner engaged in "numerous and egregious" violations of the Act (242 N.L.R.B. at 1057) and that extraordinary remedies were necessary to dissipate the coercive effect of those violations (*id.* at 1058-1059). The District of Columbia Circuit sustained these findings (640 F.2d at 395, 399-403), and this Court denied review. Petitioner does not dispute—nor could it—that serious, unremedied unfair labor practices would taint Local 80's showing of majority support. See *IAM* v. *NLRB*, 311 U.S. 72, 77-79, 82 (1940); *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 184 (8th Cir. 1964); *NLRB* v. *Burke Oldsmobile, Inc.*, 288 F.2d 14, 16 (2d Cir. 1961).[6] Accordingly, there is no occasion for further review by this Court.

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[6] Against this background, there is no basis for petitioner's assertions that it had committed only "technical violations of the Act" (Pet. 6) and that it "substantially remedied" those violations (Pet. 4) by complying only with the Board's reinstatement order, while refusing to comply with the notice and access provisions of the Board's order until after the Board instituted contempt proceedings.

2. In any event, petitioner's challenge to the Board's *Bruckner* rule is without merit. In *Bruckner*, the Board held that, where no union was currently recognized or certified as exclusive bargaining representative, and one of two or more competing unions filed a *valid* election petition (that is, one supported by at least 30% of the unit employees), it would be unlawful for the employer to recognize any of the rival unions based on authorization cards. However, modifying its then-existing policy, the Board held that, where no valid election petition has been filed, an employer may lawfully recognize a union that has the support of an uncoerced, unassisted majority of the unit employees, despite the existence of a rival union campaign. 262 N.L.R.B. at 957.[7] As the court of appeals explained (Pet. App. A12-A13), authorization cards are not a reliable indicator of majority support when competing unions are soliciting cards, because many employees may sign cards for both unions, making it impossible to determine which one they support. The Board reasonably determined that, where one union has filed a valid election petition and has thus demonstrated that it has obtained cards from at least 30% of the employees, there is a substantial risk that a second union's card majority does not really reflect majority support because it includes employees who have signed cards for both unions. Accordingly, the Board reasonably concluded that a card check in these circumstances is not an adequate substitute for a secret-ballot election.[8]

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[7] In *RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982), a companion case, the Board, overruling *Shea Chemical Corp.*, 121 N.L.R.B. 1027 (1958), held that the filing of a petition by a rival union does not relieve an employer of its obligation to continue to bargain with an incumbent union. 262 N.L.R.B. at 965 & n.12.

[8] In the instant case, Local 80 had 39 cards in a unit of 73 employees. However, petitioner neither informed Local 115 of the card check nor alerted the American Arbitration Association, which

Moreover, as the Board explained in *Bruckner*, 262 N.L.R.B. at 957, "[m]aking the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union, initial organizing situations will establish a clearly defined rule of conduct and encourage both employee free choice and industrial stability." If the rival union has not filed an election petition, the employer may recognize the first union, as long as it actually has valid majority support. If the rival union does file a petition, but does not have the support of at least 30% of the unit employees, its petition will be promptly dismissed; thus, it will not be possible for a union with minimal employee support to block recognition of a union with clear majority support. On the other hand, if the petitioning union does have 30% support, the employer, upon receiving notice of the petition, will know that there is a serious contest for its employees' allegiance and that, in order to avoid unduly influencing that contest, it should refrain from recognizing any union until an election is held.

Petitioner concedes (Pet. 8) that no other court of appeals has considered the *Bruckner* rule since the Board adopted it. In arguing (Pet. 8-11) that the decision of the court of appeals here conflicts with decisions of other courts, petitioner relies, in part, on cases in which the Board decisions rejected by courts of appeals do not reflect the Board's present rule.[9] In most of the other

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conducted the card check, of Local 115's interest and of the resulting possibility of dual signatures. Particularly on these facts, the card check cannot be viewed as sufficiently reliable evidence of Local 80's majority status. Moreover, Local 115 had obtained authorization cards from considerably more than 30% of petitioner's employees—and in fact almost attained majority status—at the time its election petition was filed.

[9] In *Playskool, Inc.* v. *NLRB*, 477 F.2d 66, 67-68, 71-72 (7th Cir. 1973) (Pet. 10), no petition had been filed by the rival union. In *District 50, UMW* v. *NLRB*, 234 F.2d 565, 569 (4th Cir. 1956)

cases cited by petitioner, the courts upheld the Board's decision.[10] The only cited case directly involving recognition of one union in the face of a valid rival election petition in an initial organizing situation in which the Board's finding of unlawful recognition was reversed is *NLRB* v. *Newport Division of Wintex Knitting Mills,* 610 F.2d 430 (6th Cir. 1979). That case was decided without the benefit of the Board's rationale in *Bruckner.* Moreover, the Sixth Circuit's per curiam order in *Wintex Knitting Mills* relied on the fact that the rival union that had filed a representation petition appeared to have ceased its organizational activity by the time the employer recognized the other union. 610 F.2d at 431. There was no such evidence here. Indeed, it was clear to petitioner when it recognized Local 80 that Local 115 retained its interest in representing the employees, because Local 115 was still seeking a bargaining order. Moreover, the Sixth Circuit in *Wintex Knitting Mills* indicated that its holding depended on the

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(Pet.11), the rival union's petition had been dismissed. Under *Bruckner,* the Board would not now bar recognition on the basis of a showing of majority support of one of two competing unions in such circumstances. *NLRB* v. *North Electric Co.,* 296 F.2d 137, 139-140 (6th Cir. 1961) (Pet. 9) involved continued recognition of an incumbent union, which would be sanctioned under *RCA Del Caribe,* discussed at note 7, *supra.*

[10] In *St. Louis Independent Packing Co.* v. *NLRB,* 291 F.2d 700, 704-705 (7th Cir. 1961) (Pet. 11), the court upheld the Board's position that the employer was required to remain neutral in the face of the Board's direction of an election. In *American Can Co.* v. *NLRB,* 535 F.2d 180, 183, 186-188 (2d Cir. 1976) (Pet. 11), the court found that in the particular circumstances of a representational issue involving a relocation, the Board properly found that a question concerning representation had been raised. In *Iowa Beef Packers, Inc.* v. *NLRB,* 331 F.2d 176, 181-184 (8th Cir. 1964) (Pet. 9-10), the court upheld the Board's decision that the employer unlawfully recognized one competing union in the face of a rival petition where the employer also rendered unlawful assistance to the former.

fact that one of the two rival unions had "convincingly demonstrated its majority status, [11] without any help from the employer." 610 F.2d at 431, citing *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969). In this case, by contrast, Local 80 obtained cards from only slightly more than half of petitioner's employees, and petitioner's "repeated and egregious" unfair labor practices (640 F.2d at 395) that were calculated to discourage Local 115's organizing activities—and were still unremedied—had the effect of assisting Local 80.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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[11] The union had obtained authorization cards from 96 of the 135 employees, well in excess of a bare majority. 610 F.2d at 431.

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